JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 22[illegible]

LEWIN WETHERED, TRUSTEE OF THE ESTATE OF JOHN B. GAITHER, JR., INC., BANKRUPT,
Petitioner,

v.

ALBAN TRACTOR COMPANY, INC., HERBERT L. WYNNE, TRUSTEE, AND PLAZA CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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Lewin Wethered, Trustee of the Estate of John B. Gaither, Jr., Inc., Bankrupt, prays that a writ of certiorari issue to review the decree entered in this cause on April 13, 1961, by the Court of Appeals of Maryland.

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland (Appendix B) is reported at 168 A. 2d 358. The opinion of the Circuit Court No. 2 of Baltimore City (printed at pp. 23-44, incl., of the Record Extract in the Court of Appeals.

copies of which are furnished with this Petition) is reported unofficially in The Daily Record (Baltimore, Md.), for March 19, 1960.

JURISDICTION

The decree of the Court of Appeals of Maryland, which is here sought to be reviewed, was filed March 9, 1961, and the petitioner here filed motions for modification and reargument on April 7, 1961, which were denied on April 12, 1961, following which the mandate and transcript were forwarded to the Lower Court by the Clerk of the Court of Appeals of Maryland on April 13, 1961. The jurisdiction of this Court is invoked under U.S. Code, Title 28, Section 1257(3).

QUESTIONS PRESENTED

The questions in the case relate to the right of a Trustee in Bankruptcy to avoid an unrecorded chattel mortgage of the now bankrupt mortgagor on which foreclosure proceedings had been instituted and a sale of the mortgaged property made many months prior to the commencement of bankruptcy, but after Federal taxes and interest were assessed against the mortgagor, which, Petitioner contends, gave rise to a lien on that property entitling him to avoid the mortgage and the foreclosure proceedings by and under Section 70(e) of the Bankruptcy Act. These questions are:

ONE: Under Internal Revenue Code, Section 6321, is a prior demand for payment of interest a prerequisite to the creation of a Federal tax lien, particularly a lien for interest?

TWO: If this question be answered affirmatively:

A. Can such a requirement be waived by the taxpayer, or, in the alternative, satisfied by the taxpayer's knowledge

of the amount due coupled with (and as evidenced by) tender of a bad check in payment?

B. Can same be satisfied under a doctrine of "relation back" by the subsequent formal claim of the Federal Government in other legal proceedings?

THREE: Under Section 6323, Internal Revenue Code, does notice of a Federal tax lien have to be duly filed to be valid as against a precedent mortgage improperly recorded? Or, in the alternative, does a prior unrecorded mortgage prevail over an unfiled Federal tax lien.

(NOTE: This involves the decision of this Court in *United States v. R. F. Ball Construction Co.*, 355 U.S. 587, 78 S. Ct. 442, 2 L. Ed. 2d 510.)

STATUTES INVOLVED

The applicable provisions of the Internal Revenue Code (26 U.S.C.A. Sections 6321, 6322, 6323 and 6601) and of the Bankruptcy Act (11 U.S.C.A., Section 70(e)) are printed in Appendix A, infra, pp. 11-13, inclusive.

STATEMENT OF THE CASE

Petitioner is Trustee in Bankruptcy of John B. Gaither, Jr., Inc., a now defunct Maryland corporation.

In May, 1955 Alban Tractor Co., Inc., sold Gaither certain equipment upon which Gaither executed a mortgage to Alban. It was recorded in Baltimore City, not in Baltimore County (a separate political jurisdiction), where as court decisions later revealed, local law required recordation for this mortgage to be valid against protected classes of persons named in that law.

On August 22, 1956, the United States entered an assessment against Gaither for delinquent taxes in the amount

of $5,705.32, penalty of $285.87 (for late filing), and interest from the due date of July 31, 1956, to the date of assessment in the sum of $19.19. In fact, Gaither had paid the $5,705.32 on August 14, 1956. If credit had been then allowed for this payment, that would have left due the penalty and interest totaling $305.06.

On November 5, 1956, Alban filed a petition in the Circuit Court No. 2 of Baltimore City to foreclose the mortgage then in default. The foreclosure sale was held December 1, 1956, and certain creditors of Gaither's filed exceptions to its ratification. Pursuant to a stipulation, the sale was later ratified on June 6, 1957.

The United States filed notice of its tax liens (including that of August 22, 1956) in Baltimore City on December 27, 1956, and in Baltimore County the next day. Meanwhile, Gaither undertook to pay the amount of $305.06 by a check received November 14, 1956, by the District Director's office. This was not paid when presented and the following day (November 15, 1956) Gaither made a deed of trust for the benefit of its creditors. It was recorded in Baltimore City preliminary to assumption of jurisdiction of that matter by the local court. Many months later, the Court of Appeals of Maryland held in a decision on March 5, 1958, that Gaither's legal corporate residence was Baltimore County. Under local law, the latter, and not Baltimore City, was thus the proper place for recordation of the deed of trust and the chattel mortgage.

Following that decision (*O'Toole Tire Company v. John B. Gaither, Jr., Inc.*, 139 A.2d 252, 216 Md. 54), (which invalidated the deed of trust for the benefit of creditors) Gaither was adjudicated a bankrupt on May 12, 1958, and the petitioner appointed trustee in the bankruptcy case.

His efforts to capture the proceeds of the foreclosure sale then began and continue to this time.

Still later, the Court of Appeals held in another case (*Plaza Corporation v. Alban Tractor Company, Inc.*, 151 A. 2d 170, 219 Md. 570) between Alban and a competing mortgagee (Plaza) that Alban's mortgage was not recorded as required by Maryland law.

The Court of Appeals of Maryland in its decision which Petitioner asks this Court to review (Appendix B commencing at p. 14) held, inter alia:

> A. "There was no Federal lien because that government made no demand upon Gaither for payment of any tax (a mandatory, statutory prerequisite to the creation of such a lien) at a time when Gaither had any property or rights of property to which a lien could attach" (Appendix B, p. 19).
>
> B. "The interest included in the amount of $305.06 specified in the notice of lien duly recorded is provable in bankruptcy but no lien ever arose as to it because it was never demanded to be paid. Section 6321 creates a lien only if a person owing a tax 'neglects or refuses to pay same after demand.' " (Appendix B, p. 22).
>
> C. "Nor do we reach the question whether when Section 6323 says the Federal lien shall not be valid as against 'any mortgagee' until notice of the lien has been filed, it includes a mortgagee under an unrecorded mortgage, that is, whether a nonstatutory contractual lien must be choate and perfected to prevail. The Supreme Court has never given an explicit answer" Appendix B, p. 26. (NOTE: there follows a consideration of the *Ball* case, supra, pp. 27, 28).

On questions ONE and Two, Alban's counsel argued in the trial court that no lien was established prior to the foreclosure because no interest was demanded to be paid. However, that court only referred to this point in com-